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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WILLIAMS,

Defendant and Appellant.

F044216

(Super. Ct. No. KF002498)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. John I. Kelly, Judge.

Ross Thomas, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Harris, Acting P.J., Cornell, J. and Gomes, J.

STATEMENT OF THE CASE

On May 15, 2003, the Kern County District Attorney filed an information in superior court charging appellant as follows: count I—felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); count II—misdemeanor driving under the influence (Veh. Code, § 23152, subd. (a)); and count III—misdemeanor being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)).

On May 19, 2003, appellant was arraigned, pleaded not guilty to the substantive counts, and requested a jury trial.

On August 13, 2003, appellant filed a motion for an order to produce documents for inspection under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. On August 28, 2003, the prosecution filed written opposition to the motion. On September 11, 2003, the court conducted an in camera hearing and granted the defense motion for discovery of the documents.

On September 22, 2003, jury trial commenced in superior court.

On September 24, 2003, the jury returned verdicts finding appellant guilty as charged.

On October 23, 2003, the court suspended execution of sentence and placed appellant on formal probation as to count I for a period of three years, subject to a number of conditions, including service of six months in county jail. The court imposed concurrent jail terms of 30 days and six months on counts II and III, respectively. The court also ordered appellant to pay a $50 fine (Health & Saf. Code, § 11372.5), a $100 penalty assessment (Health & Saf. Code, § 11372.7), a $20 state surcharge (Pen. Code, § 1465.7), and expenses of probation supervision and presentence investigation. The court imposed a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)), ordered appellant to serve an additional 13 days of custody in lieu of a fine on count II, and awarded two days of custody credits.

On October 29, 2003, appellant filed a timely notice of appeal.

STATEMENT OF FACTS

California Highway Patrol Officer Jeremy Mullen and his partner, Officer Jason Kremsdorf, patrolled the community of Lake Isabella on the evening of March 22, 2003. At about 8:00 p.m., Mullen noticed a maroon van weaving back and forth as it traveled north along Lake Isabella Boulevard. He also saw the vehicle had its high beams operating in the face of oncoming traffic. Southbound drivers flashed their lights in an effort to get the northbound driver to dim his lamps. Mullen effected a traffic stop in an area with some lighting.

Officer Mullen went to the driver's window of the van and contacted appellant, the driver and sole occupant. Mullen informed appellant of the reasons for the stop and appellant claimed his low beam headlights did not work. Mullen obtained appellant's license and registration, smelled the odor of marijuana in the van, and asked appellant about it. Appellant admitted he had "smoked one joint approximately an hour earlier" and said he still felt the effects of the marijuana. Mullen thought appellant was "anxious" and "fidgety." His speech was "rapid," the sentences he spoke were incomplete, and appellant would speak on one topic and then "just go on to something else." Mullen also noticed the "white" of appellant's eyes was "redder than normal."

Officer Mullen asked appellant to get out of the van to take some tests "to make sure he was safe to drive." Appellant complied and the officer gave him some field sobriety tests. Appellant displayed "no signs of nystagmus," a possible sign of impairment from alcohol or a depressant. However, appellant was unable to successfully perform some balance and coordination tests and a time estimate test. Mullen noticed that appellant had "eyelid tremors or flutters," a possible sign of impairment from a stimulant. Appellant's pulse was elevated, his pupils were dilated, he did not react to the officer's penlight, and his tongue had a white film on it. Mullen said all of these signs demonstrated possible stimulant impairment. When Mullen asked whether appellant had

recently used methamphetamine, he replied, "[N]ot in about four months." Officer Mullen concluded appellant was under the influence of a stimulant and arrested him on that basis and for operating the vehicle in that condition.

Mullen searched appellant's person and found a small Ziploc bag in his right front pants pocket. The bag contained "a white crystalline substance." Mullen asked whether the bag was appellant's "meth" and appellant did not reply. The officer then transported appellant to a nearby detention facility and had him perform a breath test, which failed to detect the presence of alcohol. Mullen was able to obtain a urine sample from appellant about one or two hours after the initial stop. Mullen performed a presumptive test on the white powder seized from appellant and it came back positive for amphetamine.

Apryl Brown, a forensic technician with the Kern County Crime Laboratory, testified that appellant's urine sample "screened positive" for "very strong level[s]" of amphetamine and THC. She concluded that amphetamine was "definitely" in appellant's system "when the urine sample was taken." Elizabeth Ortega, property officer with the Kern County Crime Laboratory, related that appellant's counsel had access to the urine sample for independent testing. Joe A. Fagundes, a criminalist with the same crime laboratory, testified the powder seized from appellant contained methamphetamine and weighed 0.13 grams. In the opinion of Fagundes, this was a usable amount of the substance.

Defense

Deborah Brown worked weekends with appellant at the KV Bottle Shop, a liquor store in Lake Isabella.[1] They worked together on the day of his arrest. She recalled him bending over and picking something up from the floor of the store that day. He said,

[1] Although the defense anticipated calling Brown as a witness, the prosecution actually called her to testify.

"[L]ook what I found" and held up "a small Ziploc bag with some white stuff in it." Some customers entered the store and she told appellant, "[P]ut that away or get rid of it or something." Brown did not see what appellant did with the bag. Brown said she had to begin work early the next day after learning appellant "had been arrested." Appellant later told her he "stuck" the bag in his pocket, forgot it was there, and then got "pulled over and arrested for it" after he left work. Brown wrote a letter to the Office of Public Defender on appellant's behalf. Brown explained it was not unusual for store employees to find such contraband in their workplace and she had never seen appellant "act like he's been on drugs or anything."

DISCUSSION

Alleged Instructional Error

Appellant contends the trial court denied his state and federal constitutional rights to due process of law and a fair trial by giving CALJIC Nos. 2.25 (refusal of witness to testify—exercise of privilege against self-incrimination) and 2.50.2 (definition of preponderance of the evidence).

Criminal defendants are guaranteed a fair trial by the due process clause of the Fourteenth Amendment to the United States Constitution. Due process demands whatever is necessary for fundamental fairness. The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. Specifically, due process guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice. To declare a denial of it we must find the absence of that fairness fatally infected the trial. In other words, the acts complained of must be of such quality as necessarily prevents a fair trial. (*People v. Sixto* (1993) 17 Cal.App.4th 374, 399.)

Penal Code section 1259 states:

> "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law

> involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

In criminal cases, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Specifically, a trial court must instruct on every issue supported by substantial evidence. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1523.) A party is not entitled to an instruction on a theory for which there is no substantial evidence. (*People v. Memro* (1995) 11 Cal.4th 786, 868.)

In addition, the trial court has a correlative duty to refrain from instructing on principles of law that have the effect of confusing the jury or relieving it from making findings on relevant issues. (*People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10, disapproved on another point in *People v. Flood* (1998) 18 Cal.4th 470, 484, 490, fn. 12.) In reviewing a challenge to jury instructions, we must consider instructions as a whole. We assume the jurors are capable of understanding and correlating all the instructions given to them. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1294.) A single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge. (*People v. Frye* (1998) 18 Cal.4th 894, 957.) An appellate court conducts an independent review of issues pertaining to instructions. (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411.)

CALJIC No. 2.25, as read to the jury, states:

> "When a witness refuses to testify to any matter relying on the constitutional privilege against self-incrimination, you must not draw from the exercise of this privilege any inference as to the believability of the

witness or whether the defendant is guilty or not guilty on any other matter at issue in this trial."

CALJIC No. 2.50.2, as read to the jury, states:

"The preponderance of the evidence means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who has the burden of proving it. You should consider all of the evidence bearing upon every issue regardless of who produces it."

After the jury retired to deliberate, the court and counsel engaged in the following exchange:

"THE COURT: Counsel, you have observed the reading of the jury instructions. Do you have any comments?

"MS. HARTNETT [deputy district attorney]: Yes, your Honor. I think there might have been some jury instructions that weren't relevant in this case that were read.

"THE COURT: Yes.

"MS. HARTNETT: We didn't have a chance –

"THE COURT: And there's the jury instruction that says if the instructions are not relevant disregard them.

"MS. HARTNETT: Okay. Well, I'm just saying that I don't know if they should be submitted to the jury like the refusal of the witness to testify, for example. I think that's when it's a witness who claims the Fifth.

"THE COURT: That's right. That was submitted and I gave it, but that's not – that just falls into that same category.

"MS. HARTNETT: Right. Well, I always submit that if there is someone who can incriminate themselves.

"THE COURT: You should have withdrawn it, but you didn't, so it was given –

"MS. HARTNETT: Well—

"THE COURT: —as requested. And the instructions –

"MS. HARTNETT: Well, your Honor, there wasn't an opportunity to withdraw it, but I do think that it will confuse the jury possibly. They'll think it refers to the defendant.

"THE COURT: What do you suggest that we do?

"MS. HARTNETT: Just perhaps let the jury know that there were a couple of jury instructions that were read that they should disregard and they're –

"THE COURT: I've already told them that.

"MS. HARTNETT: —in the packet. [¶] Well, there's another jury instruction about which I'm concerned, your Honor, and it has to do with Count 3.

"THE COURT: Yes.

"MS. HARTNETT: Um –

"THE COURT: Jury instruction number what?

"MS. HARTNETT: [Instruction] Number three – 16.060.

"THE COURT: Yes, ma'am.

"MS. HARTNETT: And you read it. A person willfully and unlawfully used a controlled substance, namely, methamphetamine. The, um, Information and what the People are alleging is actually that he was under the influence of a controlled substance. No one saw him ingesting it.

"THE COURT: That's more specifically provided in the jury instructions as well, so they have that instruction.

"MS. HARTNETT: Right, but I think that we crossed – we might have crossed that one out. And I just want the jury to understand, because I think they might be confused and think –

"THE COURT: Well, if that's a request to give further instruction in that regard it's denied. [¶] Anything further?

"MR. RICH [deputy public defender]: The only one I'm concerned about is the first one you mentioned there about the witness not testifying. That might be taken as a – construed against Mr. Williams.

"MS. HARTNETT: That's what I'm worried about. And it has to do with another person coming in and incriminating themselves.

"THE COURT: Well, I've already made a ruling. I'm not going to do anything about it.

"MR. RICH: Just for the record, I would join in Ms. Hartnett's request to have the jury – that withdrawn. It could be – I know why she put it in there because there were some witnesses that might take the Fifth. It just so happened they didn't, and it's not relevant now.

"MS. HARTNETT: Exactly. That's why I included it, your Honor.

"THE COURT: If you'll more carefully submit these instructions maybe we wouldn't get to this kind of a dilemma.

"MS. HARTNETT: Yes, your Honor. I always submit all the instructions that could be used. And then, like I said, there were some witnesses that could have incriminated themselves, and should that be the case then this is something that I must include. But we hadn't had an opportunity to address it. But I am concerned that they'll –

"THE COURT: If you'll call – if you'll review CALJIC 17.31 it provides as follows: The purpose of the Court'[s] instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. That covers those areas that you have indicated a concern about, and that was given to them.

"MS. HARTNETT: Okay, your Honor. And I'm not –

"THE COURT: Anything further?

"MS. HARTNETT: Yeah. Just the number three instruction. I'm still very concerned about that because it's different from the Information that they will be looking at.

"THE COURT: Okay. I already made a ruling on it, so – anything further? [¶]...[¶]

"MS. HARTNETT: Just the objection to the – to 16.060, your Honor, um, that that states that someone basically saw him ingest a controlled substance. And the People allege that he was under the influence rather than that he ingested.

"THE COURT: Okay. I think we've already ruled on that.

"MS. HARTNETT: I'd just like to –

"THE COURT: You want to say it a third time.

"MS. HARTNETT: Just to be on the record, your Honor.

"THE COURT: All right. You're on the record."

CALJIC No. 2.25

Appellant contends:

"… [T]he court's instructional errors must be reviewed under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. ... [']The inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.' (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 ….)

"This same standard must be applied to the court's error in reading CALJIC No. 2.25. That instruction characterized appellant's non-appearance in the witness stand as a 'refusal to testify.' While the instruction advised the jury not to draw any inference from his absence, it did create in the jury's mind the incorrect impression that appellant had 'refused' to defend himself at trial. Since this error necessarily implicates appellant's rights to a fair trial and to present a defense, as well as his right against self-incrimination, it is of constitutional dimension. [¶]...[¶]

"The very language of CALJIC 17.31 demonstrates that the instruction could not correct the court's mistakes. It directed the jury to '[d]isregard any instruction which applies to facts determined by you not to exist.' However, there was no reason for the jury to apply this directive to ... CALJIC No. 2.25. The panel of lay[people] had no idea that in the context of this case CALJIC No. [2.25] was an incorrect statement of law. Accordingly, the jurors had no reason to disregard it....

"In summary, the trial court should never have read ... CALJIC No. 2.25. Once it was made aware of its mistake, the court should have reviewed those instructions delivered and advised the jury to disregard ... CALJIC [No.] 2.25 …." (Fn. omitted.)

Under California law, it is error to charge the jury on abstract principles of law not pertinent to the issues in the case. The reason for the rule is obvious.

Such instructions tend to confuse and mislead the jury by injected into the case matters that undisputed evidence show are not involved. Nevertheless, this type of instructional error does not require reversal unless it is affirmatively shown that defendant was prejudiced thereby and that there is a reasonable probability that, absent the error, the jury would have returned a verdict more favorable to the defendant. (*People v. Robinson* (1999) 72 Cal.App.4th 421, 428-429.)

Shortly after instructing the jury in CALJIC No. 2.25 in the instant case, the court gave CALJIC Nos. 2.60 (defendant not testifying—no inference of guilt may be drawn) and 2.61 (defendant may rely on state of evidence). CALJIC No. 2.60, as read to the jury, stated:

> "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that the defendant does not testify. [¶] Further, you must neither discuss this matter nor permit it to enter into your decisions or deliberations at any time – in any way."

CALJIC No. 2.61, as read to the jury, stated:

> "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge or charges against him. [¶] No lack of testimony on – on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any essential element."

Here, we cannot say the acts complained of were of such quality as necessarily prevented a fair trial. Clearly, the respondent concedes the trial court erroneously gave CALJIC No. 2.25. However, respondent correctly maintains that appellant was not subjected to a substantial risk of prejudice because the court also gave CALJIC Nos. 2.60 and 2.61 and advised the jury it could not hold the exercise of the privilege against him. The court further instructed in CALJIC No. 17.31 (all instructions not necessarily applicable) as follows:

"The purpose of the Court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given that I am expressing an opinion as to the facts."

Appellant argues in reply:

"… This claim misses the point. The [challenged] instruction characterized appellant's non-appearance in the witness stand as a 'refusal to testify.' While the instruction advised the jury not to draw any inference from his absence, it created in the jury's mind the incorrect impression that appellant had 'refused' to defend himself at trial. Since there was nothing to dispel this impression, it is impossible to argue that the delivery of CALJIC No. 2.25 did not prejudice appellant's constitutional right to a fair trial."

Appellant's vigorous contention has merit only if we assume the jury disregarded or ignored the admonition of the court and somehow drew from appellant's declination to testify "an[] inference as to the believability of the witness or whether the defendant is guilty or not guilty on any other matter at issue in this trial." This we may not do. Jurors are presumed to understand and follow the court's instructions. (*People v. Vega* (1990) 220 Cal.App.3d 310, 318.) A defendant is entitled to a fair trial, not to a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214.) Although the court erroneously gave an irrelevant instruction, CALJIC No. 2.25, we cannot say there is a reasonable probability that, absent the error, the jury would have returned a verdict more favorable to appellant.

CALJIC No. 2.50.2

During closing argument, appellant's trial counsel stated:

"[F]irst of all ... there is a real question here of whether or not Mr. Williams did possess this methamphetamine under the law of the State of California as legal possession is defined. There is something called in the State of California temporary possession for disposal. That's the shorthand for it. And if you possess something and you don't intend to keep it and you're possessing it merely to dispose of it, then it's not a violation of the possession of illegal – of an 11377(a), which the defendant is charged with in this case. The judge will read you that law in a moment, I think.

> "And the evidence can come from any source. It can come from my witness or the prosecution witnesses. And the burden to show this is by a preponderance of the evidence. The Defense has to show this possession for disposal by what's called a preponderance of the evidence. And the judge will define what preponderance of the evidence is to you when he reads you the jury instructions in a minute, but I think that this has been shown as it states by the testimony of Deborah Brown."

The court subsequently instructed the jury in CALJIC No. 12.06 (possession—not unlawful—burden of proof) as follows:

> "A person is not guilty of a crime when his or her possession of a controlled substance is shown to be lawful. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish that his or her possession of the controlled substance is lawful.
>
> "The possession of a controlled substance is lawful when all of the following conditions are met:
>
> "One, the possession is momentary and based on neither ownership nor the right to exercise control over the controlled substance;
>
> "Two, controlled substance – the controlled substance is – is possessed solely for the purpose of abandonment, disposal, or destruction;
>
> "Three, the controlled substance is possessed for the purpose of terminating the unlawful possession of it by another person or preventing another's person from acquiring possession of it; and
>
> "Four, control is not exercised over the controlled substance for the purpose of preventing its immediate seizure by law enforcement."

Immediately after giving CALJIC No. 12.06, the court gave CALJIC No. 2.50.2, defining the term "preponderance of the evidence."

Appellant argues:

> "The trial court's conflicting instructions on the burden of proof constituted an error of constitutional dimension. First, it instructed the jury in accordance with CALJIC No. 2.90, which defines 'reasonable doubt'…. Almost immediately thereafter the court defined the 'preponderance of evidence of proof,' telling the jury that '"[p]reponderance of evidence" means evidence that has more convincing force than opposed to it.['] ... Without question the delivery of this latter instruction invited the jury to

> decide this case based on a standard of proof far below that mandated by the federal and state constitutions. Accordingly, the court's instructional errors must be reviewed under the harmless beyond a reasonable doubt standard . . .."

The essential elements of possession of a controlled substance are dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.) Under limited circumstances, the momentary or transitory possession of an unlawful narcotic for the purpose of disposing of it can constitute a defense to a charge of criminal possession of the controlled substance. In other words, although there is no specific intent element in the crime of simple possession of controlled substances, brief or transitory possession of narcotics with the intent to dispose of the contraband can establish the defense of transitory possession. Recognition of a transitory or momentary possession defense serves the salutary purpose and sound public policy of encouraging disposal and discouraging retention of dangerous items such as controlled substances and firearms. (*People v. Martin* (2001) 25 Cal.4th 1180, 1182, 1191.)

The trial court is required to instruct the jury on both the assignment and the magnitude of burdens of proof. The due process clause of the federal Constitution requires the People to prove every element of a criminal charge beyond a reasonable doubt. However, the due process clause does not invalidate every instance of burdening the defendant with proving an exculpatory fact. (*People v. Spry* (1997) 58 Cal.App.4th 1345, 1367, disapproved on another point in *People v. Martin, supra,* 25 Cal.4th at p. 1192.) For example, the burden is on the defendant to raise and prove an affirmative defense to a criminal charge. (*People v. Mayberry* (1975) 15 Cal.3d 143, 157; *People v. George* (1994) 30 Cal.App.4th 262, 275.) The defendant has the burden of proving the existence of

the transitory or momentary possession defense by a preponderance of the evidence and the assignment of this burden does not violate the due process clause of the Constitution. (*People v. Spry, supra,* at p. 1369.)

In the instant case, the trial court properly instructed on the affirmative defense of transitory or momentary possession pursuant to CALJIC No. 12.06 and immediately defined the term "preponderance of the evidence," as used in CALJIC No. 12.06, pursuant to CALJIC No. 2.50.2. As noted above, a single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge. (*People v. Frye, supra,* 18 Cal.4th at p. 957.) We assume the jurors are capable of understanding and correlating all the instructions given to them. (*People v. Fitzpatrick, supra,* 2 Cal.App.4th at p. 1294.) No error occurred with respect to CALJIC No. 2.50.2, particularly where defense counsel embraced the affirmative defense of transitory or momentary possession in his closing argument.

DISPOSITION

The judgment is affirmed.